IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.206 OF 2007
IN
NOTICE OF MOTION NO.125 OF 2006
IN
PETITION NO.835 OF 2005

Chandra alias Gullu Ramesh
Manghnani, Ganga Estates,
G-Wing, Flat No.605, Near
Atur Park and R.B.I. Colony,
Chembur, Mumbai-400 071. .... Appellant

- Versus -

1. Kishanchand Laxmidas
   Aidasani, age 66 years,
   Domicile: State of
   Maharashtra

2. Madhu Laxmandas Aidasani,
   Age 62 years,
   Domicile: State of
   Maharashtra

3. Harchandrai Bhagwandas
   Aidasani, Age 60 years,
   Domicile: State of
   Maharashtra

All adults, Hindu Indian
inhabitants, the Executors of
the Will of the deceased
abovenamed residing at
Satgur Saya, 86/3, Ghatla
Village Road, Chembur,
Bombay-400 071. .... Respondents

Sarvasri Sanjay Jai with D.P. Desai for
the Appellant.

Sarvasri J.M. Sidhawa i/b Manoj Bhatt
for the Respondents.

CORAM: R.M.S. KHANDEPARKAR &
D.G. KARNIK, JJ.

DATED: MARCH 28, 2007

ORAL JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Heard. Admit. Shri Manoj Bhatt waives service on behalf of the respondents. By consent, heard forthwith.

2. The present appeal arises from the order dated 15-12-2006 whereby the notice of motion taken out by the respondents has been granted, thereby the caveat filed by the appellant has been ordered to be excluded from the probate proceedings initiated by the respondents in relation to the Will executed by Laxmandas Lokumal Aidasani, who died on 17-5-1998. The notice of motion taken out by the respondents has been allowed solely on the ground that the appellant failed to file the affidavit in support of the caveat in accordance with the provisions of law.

3. It cannot be disputed and indeed the records clearly disclose that the petition for probate was filed by the respondents on 9-9-2005. The citation was served on 20-3-2006. The appellant herein filed the caveat on 29-3-2006. The impugned order came to be passed on 15-12-2006 in relation to the notice of motion taken out

on 17-11-2006. Undoubtedly, in terms of the Rule 402 of Chapter XXVI of the Bombay High Court (Original Side) Rules, 1980, the appellant was required to the file the affidavit in support of the caveat within eight days from the date of filing of the caveat. However, at the same time, the caveator is not precluded from filing the affidavit thereafter in case leave in that regard is obtained from the Court. In other words, though there is a mandate for filing the affidavit in support of the caveat within eight days from the date of filing of the caveat, certainly the Court, in its discretion, can extend the period and allow the caveator to file the affidavit in support of the caveat.

4. In the case in hand, the appellant is the daughter of the deceased Laxmandas Lokumal Aidasani and the respondents are the brothers of the appellant. It is the case of the respondents that the deceased father had already gifted a flat to the appellant which was sold by her prior to the execution of the Will in question. Be it as it may, it is for the probate Court to hear the matter in relation to the Will before the probate is issued and in that regard since the appellant is also the daughter of the testator, in our considered opinion, it would be appropriate to grant liberty to the appellant of being heard before an appropriate order is passed on the petition for grant of probate.

Undoubtedly, on account of the delay caused by the appellant in filing the affidavit, she would be liable to pay costs to the respondents. Viewed from this angle, the impugned order cannot be sustained and is liable to be set aside.

5. Hence the appeal succeeds; the impugned order is hereby set aside and the appellant is permitted to file the affidavit in support of the caveat within eight days from today, subject to payment of costs of Rs.10,000/- to the respondents. The payment of costs is condition precedent for the affidavit being taken on record. In case of failure on the part of the appellant to pay the costs or to file the affidavit within eight days from today, the order passed today setting aside the impugned order shall automatically stand recalled, the appeal shall stand dismissed and the impugned order shall stand confirmed. In case the costs are paid and the affidavit is filed, the probate Court may hear the parties and dispose of the petition in accordance with the provisions of law. The learned Advocate appearing for the appellant has made a statement, on instructions, that the appellant would not seek any adjournment in the probate proceedings. We accept the said statement. The appeal accordingly stands disposed of, as above.

(D.G.Karnik, J.) (R.M.S.Khandeparkar, J.)

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